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December 16, 1996

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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Re: Implementation of Section 402(b)(1)(A) of the
Telecommunications Act of 1996, CC Docket No. 96-187

Dear Mr. Caton:

This letter is in response to questions raised by Suzanne Tetreault and Debra Weiner at a meeting with representatives of MCI Telecommunications Corporation (MCI) held on November 22, 1996 concerning the proper interpretation of the term "deemed lawful" in Section 402(b)(1)(A) of the Telecommunications Act of 1996. Upon further review of the incumbent local exchange carriers' (ILECs') filings in this proceeding, MCI believes that there is less to this dispute than meets the eye, since all parties have adopted one variation or another on MCI's position that "deemed lawful" must mean "presumed lawful."

The ILECs place a great deal of emphasis on the supposed ordinary meaning of "deemed", but they simultaneously acknowledge, as they must, that the phrase "deemed lawful" cannot be construed without reference to its place in the statutory scheme, and that in this case the phrase creates only a rebuttable presumption. The Commission assumes in its Notice of Proposed Rulemaking, and no one disputes the point, that "deemed lawful" would not be "an immutable status." NPRM, at ¶10. Pacific Telesis, for example, acknowledges that the "deemed lawful" language creates only a presumption of lawfulness, and that this presumption can be rebutted in a complaint or Section 205 proceeding.¹ Thus, most of the ILECs agree with MCI and the other non-ILEC parties that the presumption can be rebutted at

¹ Pacific Telesis Comments at 5; see also Southwestern Bell Tel. Comments at 3 (the Commission could overturn presumption of lawfulness in a §205 proceeding); US West Comments at 5 (the Commission could declare a tariff "deemed lawful" to be unlawful in §205 or §208 proceedings).

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the end of a Section 205 investigation or a formal complaint proceeding under Sections 206-09 of the Act.

This acknowledgment by the ILECs squarely contradicts all of their protestations that the "natural" or "plain" meaning of "deemed" obviously creates something more than a rebuttable presumption. In fact, "deemed" "is not an unusual word, but a common one, and has acquired no technical or peculiar signification, but it is a word of various meanings, often dependent on the circumstances in connection with which it is used"² As is generally the case in statutory construction, the Commission and courts expounding this statute "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."³ Accordingly, the reply comments of Southwestern Bell, citing a few statutory provisions and one case,⁴ do nothing more than provide irrelevant examples of how the word "deemed" has been used by Congress in unrelated contexts. As this Commission recently pointed out,

"[w]here the subject matter to which words refer is not the same in the several places where they are used, or the conditions are different....the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."⁵

In other contexts, Congress has used "deemed" to mean something other than creating an immutable status applicable to all situations.⁶

² 26A C.J.S. Deem (1956).

³ Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956).

⁴ Reply Comments at 4-5.

⁵ Memorandum Opinion and Order, New England Public Communications Council Petition for Preemption Pursuant to Section 253, FCC 96-470, CCBPol 96-11 (released Dec. 10, 1996), at ¶ 24 n. 72 (quoting Atlantic Cleaners and Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

⁶ See, e.g., Conoco, Inc. v. Skinner, 970 F.2d 1206, 1224-25 (3rd Cir. 1992) (statutory provision "deeming" a ship owning corporation a citizen was not meant to render the corporation a citizen for all purposes, because such a construction would yield harsh or absurd results); Davis v. Califano, 603 F.2d 618, 621

Assuming, as all parties do, that the "deemed lawful" language does not create an immutable status, but, rather, creates only a presumption that can be rebutted at the conclusion of a Section 205 investigation or a formal complaint proceeding, the only remaining issue between the commenting parties is the effect of such a rebuttal. The narrow question presented in the comments is whether such rebuttal and a finding of unreasonableness carries with it liability in a complaint proceeding for damages for the period that an ILEC tariff has been in effect, as MCI and other non-ILEC parties argue, or whether Congress intended to alter the common law and a century of administrative law under the Commerce Act and Communications Act by allowing such damages only prospectively from the date that the tariff is found unreasonable, as most of the ILECs argue. None of the ILECs' arguments as to the meaning of the term "deemed lawful" provides any assistance on this issue, since those arguments offer no distinctions among the types of rebuttable presumptions that might be created by the phrase "deemed lawful."

On this question of the interpretation of the effect of such an ambiguous term, the Chevron doctrine affords the Commission a fair degree of latitude. The Commission has the discretion to use its expertise and consider various policy rationales in choosing a sensible or practical construction of the statute, and no court may disturb that choice so long as the Commission's construction is a permissible one.⁷ MCI refers the Commission to its filed comments and reply comments for a further elaboration of its views as to the effect that can be given the presumption embodied in the phrase "deemed lawful" that would not do violence to existing protections against and remedies for monopolists' unreasonable charges.

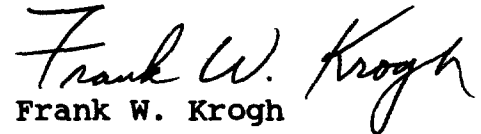
(7th Cir. 1979) (construing 42 U.S.C. §416(h)(1)(B), wherein Social Security benefits to spouse "deemed" a widow are terminated once a "legal widow" has applied for the benefits).

⁷ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984).

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Two copies of this letter are being submitted in accordance with Section 1.1206(a)(2) of the Commission's Rules.

Yours truly,


Frank W. Krogh

cc: Suzanne Tetreault
Debra Weiner
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